90-841

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DENNIS L. TAXACHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

James K. Jenkins
MALOY & JENKINS
600 Grant Building
44 Broad Street
Atlanta, Georgia 30303
(404) 522-9400
Attorneys for Petitioner

QUESTIONS PRESENTED

I. WHETHER LOWER COURTS NEED SUBSTANTIAL GUIDANCE IN CORRECT APPLICATION OF THE GOOD FAITH EXCEPTION ANNOUNCED IN *UNITED STATES V. LEON*, 468 U.S. 897 (1984).

II. WHETHER LOWER COURTS NEED ABIDE BY *LEON*'S "REASONABLE JURIST" TEST, 468 U.S. AT 926, FOR DETERMINING WHETHER AN OFFICER'S RELIANCE ON AN INVALID SEARCH WARRANT IS OBJECTIVELY REASONABLE.

III. WHETHER THE APPEALS COURT WRONGLY DECIDED PETITIONER'S CASE BY FAILING TO CONSIDER ALL OF THE CIRCUMSTANCES IN THE RECORD.

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The Petitioner, DENNIS L. TAXACHER, petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this cause June 4, 1990.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 902 F.2d 867 and is printed as Appendix A hereto. The

order of the District Court denying Petitioner's motion to suppress is printed as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1990, with rehearing denied July 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1988) by timely filing this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that a writ of certiorari should issue for three reasons. First, it is time for this Court to provide lower courts with badly needed guidance in the proper application of the good faith exception the Court announced six years ago in *United States v. Leon*, 468 U.S. 897 (1984). Second, there is a direct conflict among the circuits as to the application of the "reasonable jurist" test suggested in the closing paragraph of *Leon*, 468 U.S. at 926, for determining

whether an affidavit is so lacking in indicia of probable cause as to render the good faith exception inapplicable. Third, Petitioner submits that certiorari should issue because the Eleventh Circuit wrongly decided his case when it affirmed the trial court's denial of his motion to suppress, as the court failed to consider important evidence of the officer's lack of objective good faith.

STATEMENT OF RELEVANT FACTS

Traveling southbound on Interstate 95 in McIntosh County, Georgia, Petitioner Dennis Taxacher was clocked by Georgia State Patrol Trooper Barry Riner at 68 mph in a 55 mph zone (Transcript [hereinafter T.] 5). Taxacher pulled over without incident (T. 40), got out of his car, and produced a valid Pennsylvania driver's license and a rental car agreement (T. 5, 56). When questioned about the expired return date on the rental agreement (T. 6), Taxacher told the trooper that the car agency had extended his lease and he displayed a pink cash receipt for a deposit made five days earlier.

During the fifteen-minute roadside detention (Appendix [hereinafter App.] 17a, n.2), Trooper Riner questioned Taxacher about his itinerary and the purpose of his trip. During this questioning, Trooper Riner claimed that Taxacher became increasingly nervous (T. 10). As a consequence, Riner asked Taxacher for permission to search the car, went to his patrol car, and returned with a written consent to search form, which he asked Taxacher to sign (T. 17). Taxacher refused. According to Riner, this refusal to consent to search increased his suspicions (T. 18).

When Riner persisted in his request to search, Taxacher said he would let Riner look inside the car. After looking in the passenger area, Riner asked Taxacher

to open the trunk (T. 18), where Riner saw a hanging clothes bag, a briefcase-type satchel, and two plastic bags. Asked what was in the bags, Taxacher reportedly became very nervous and replied, "Personal items" (T. 18-19). Riner observed nothing suspicious about the luggage items (T. 50). When he asked to inspect them, Taxacher closed the trunk and told Riner he would have to get a search warrant to look any further (T. 19).

Trooper Riner directed Taxacher to follow him to the McIntosh County Sheriff's office to post a cash bond for the speeding violation (T. 58). Riner also intended to apply for a warrant to search Taxacher's car (T. 58). En route to the Sheriff's office, Riner learned that Taxacher had at one time held a Virginia driver's license which had been suspended (App. 15a). Riner detained Taxacher (T. 59) while Riner prepared a search warrant application.

Because this was Riner's first search warrant application (App. 15a, 24a), he called the local district attorney to ask for help on how to fill out the first two sections of the application, those describing the area to be searched and the items for which to search (T. 34-35). Curiously, despite his inexperience, Riner did not request or receive any other advice about applying for a search warrant (T. 75), including regarding the sufficiency of his showing of probable cause (T. 77). Trooper Riner conducted no other investigation of any kind before presenting the application to the rural Georgia county magistrate (T. 78-80, 35). Riner spent a maximum of twelve minutes preparing the application (App. 17a, n.2).

In the written search warrant application, Riner set forth the following as constituting his probable cause:

> Vehicle stopped for speeding. During conversation subject offered several inconsistent stories. Officer asked for

> consent to search. Verbal consent was given, but written consent was denied. Subject very nervous. Subject opened trunk of vehicle and stated 'see, there is nothing there . . . ', Then attempted to close trunk. Officer asked about luggage in trunk, and subject became very nervous and refused further search. The inconsistent stories are that subject stated that he was enroute to Ft. Pierce to visit his parents. But the vehicle was rented from Ft. Lauderdale, which is south of Ft. Pierce, Fla. Also upon further conversation, subject stated that he had driven from Ft. Pierce, Fla. to Pa. and then was enroute back to Ft. Pierce. Rental agreement on the vehicle indicates that vehicle should have been returned on 10/17/87.

(App. 16a-17a).

While the affidavit indicated that the rental agreement had expired, Trooper Riner did not mention Taxacher's explanation concerning the lease extension, nor did Riner indicate that he knew about the receipt for the lease extension (T. 44). Had Riner called the rental car company to check, he would have been told that the car was not due back until later the day of Taxacher's arrest (T. 88-89).

On the basis of Riner's application the county magistrate issued a search warrant for any drugs or money that might be located in Taxacher's car (T. 36). Riner showed Taxacher the warrant, obtained his keys, searched the luggage in the trunk, and found a large sum of cash (T. 36-37). Riner then requested assistance from the local Georgia Bureau of Investigation agent. When the agent arrived, another search was conducted and Taxacher was

placed under arrest for RICO and Travel Act violations based on his possession of the cash, later determined to be more than $186,000 (T. 104, 93).

Petitioner was subsequently indicted for money laundering in violation of 18 U.S.C. § 1956 (1979); for violating the Travel Act, 18 U.S.C. § 1952 (1979); and for aiding and abetting under 18 U.S.C. § 2 (1979).

Taxacher filed motions to suppress the search of his car as well as inculpatory oral and written statements he had made after his arrest (App. B 1). After an evidentiary hearing, the district court entered a written order making certain findings of fact and conclusions of law and denying both motions (App. B). The court's order contained the following analysis of the search warrant:

> The magistrate based her finding of probable cause on the following information: (1) defendant appeared overly nervous; (2) the rental agreement indicated that the car was past due; (3) defendant gave inconsistent stories about his travel plans; and (4) defendant initially consented to a search of the vehicle, then withdrew consent when the officer asked to look into a specific satchel.

(App. 21a).

The court analyzed each factor individually, finding that not one constituted probable cause (App. 21a-22a). The court concluded that "the magistrate who issued the warrant did not have a 'substantial basis for ... conclud[ing] that probable cause existed'" (App. 20a).

Having found the warrant invalid, the court then determined that the case fell within the good faith exception to the exclusionary rule as established in *United*

States v. Leon, 468 U.S. 897 (1984). The court found the warrant to be not "'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" and concluded that there was no basis for finding that Trooper Riner was reckless or dishonest in preparing the affidavit (App. 24a).

After entering a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2), Taxacher, a first offender, was sentenced to serve 41 months in prison and was fined $10,000. An appeal to the United States Court of Appeals for the Eleventh Circuit raised two issues: denial of Taxacher's motion to suppress and a sentencing issue. On June 4, 1990, a panel of the Eleventh Circuit in a quorum decision affirmed Taxacher's conviction and sentence, *United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990) (App. 1a-12a).

The appeals court upheld the district court's application of the good faith exception to the exclusionary rule (App. 6a). The court said that the lower court's finding that Trooper Riner "acted neither recklessly nor dishonestly in submitting his affidavit" was not clearly erroneous (App. 7a), and that Riner's conduct was objectively reasonable and indicative of good faith, resulting in a warrant "not so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable" (App. 10a). As to the determination of the application of the "so lacking" limitation on the good faith exception, the court explicitly rejected the reasonable jurist standard and asserted that "the proper test is whether the *officer* acted in objective good faith under all the circumstances" (App. 8a) (emphasis in original).

I. THIS COURT NEEDS TO PROVIDE SUBSTANTIAL GUIDANCE TO THE LOWER

COURTS AS TO THE CORRECT APPLICATION OF THE GOOD FAITH EXCEPTION, INCLUDING WORKING DEFINITIONS OF KEY TERMS AND APPROPRIATE TESTS AND PROCEDURES FOR APPLYING THE EXCEPTION.

In the six years following this Court's announcement of the good faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984), the lower courts in the federal and state systems have generated a wide range of interpretations of the meaning of key concepts underlying the exception, as well as a confusing array of tests and procedures for its application. Legal commentators have written widely on the varying interpretations of this Court's intent in establishing the exception. *See, e.g.*, Note, *Application Problems Arising from the Good Faith Exception to the Exclusionary Rule*, 28 Wm. & Mary L. Rev. 743 (1987); Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 Ind. L.J. 287 (1985); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?* 22 Am. Crim. L. Rev. 85 (1985); LaFave, *"The Seductive Call of Expediency"*: United States v. Leon, *Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895 (1984).

The varieties of interpretations of the good faith exception have proliferated to the point that at least one commentator perceives a threat to due process:

> When a criminal defendant's constitutional rights are at issue, due process requires uniformity of law, and until a uniform definition of objective good faith is adopted, a criminal defendant's ability to exclude evidence against him seized under an

> invalid warrant will depend largely on where he is tried.

Note, *Application Problems*, 28 Wm. & Mary L. Rev. at 757.

Justice Blackmun anticipated the disparities in the outcome in cases involving the good faith exception in his concurring opinion in *Leon*:

> By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and *this Court will attend to the results*.

Leon, 468 U.S. at 928 (Blackmun, J., concurring; emphasis added). *Leon*'s assumptions have by now been widely tested, and the procedures employed and interpretations applied have varied just as widely. Petitioner respectfully submits that it is time for this Court to "attend to the results" and to supply the "guidance from the courts" seemingly promised by the majority in *Leon*, 468 U.S. at 924. Moreover, the facts of Petitioner's case and the issues it raises concerning the application and interpretation of the good faith exception provide an unusually good context for such an undertaking.

Specifically, Petitioner asks this Court to demarcate the parameters of *Leon*'s good faith exception by defining what is meant by: (1) "objectively reasonable" behavior, *Leon*, 468 U.S. at 926, and by a "reasonably well trained officer," *id.* at 922 n.23; (2) "objective good faith," *Leon*, 468 U.S. at 920; (3) misleading a magistrate through intentionally or recklessly false information in an affidavit, *id.*; and (4) "so lacking in indicia of probable cause,"

Leon, 468 U.S. at 923. Petitioner's case is an ideal vehicle for tackling all of these ambiguities because the import of each was debated in the court below, *United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990) (Appendix A), and because each is critical to the outcome of the case.

1. *"Objectively reasonable" behavior of a "reasonably well trained officer."* In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that the Fourth Amendment exclusionary rule should not be applied to bar the use, in the prosecutor's case in chief, of evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found to be invalid. *Leon*, 468 U.S. at 920. This determination was based on this Court's conclusion that the exclusionary rule should not apply when it would have no deterrent effect, that is, "[w]here the official action was pursued in complete good faith." *Leon*, 468 U.S. at 919 (citations omitted).

However, before the good faith exception to the search warrant requirement may be invoked, there must be proof that the officer's conduct was "objectively reasonable." *Id.* This Court in *Leon* did not exhaustively catalog what would suffice to show objective reasonableness, but a review of the evidence relied on in *Leon* shows the following factors to be significant to its finding of objective reasonableness: extensive investigation into probable cause, *Leon*, 468 U.S. at 901, 926; consultation with "several Deputy District Attorneys," *id.* at 904, 904 n.4; reasonable knowledge of the limits of the law, *id.* at 919 n.20; and submission of an affidavit that provides "evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause," *id.* at 926. Adopting the definition of objective reasonableness suggested in the companion case to *Leon*, *Massachusetts v. Sheppard*,

468 U.S. 981 (1984), officers taking "every step that could reasonably be expected of them," *id.* at 989, Petitioner submits that in his case the officer fell miserably short of this standard. Petitioner maintains that the officer's entire course of conduct before presenting his application for a warrant did not exhibit objective reasonableness in light of his several failures: to conduct any independent investigation; to obtain legal advice as to the sufficiency of probable cause and to then provide sufficient probable cause in the affidavit; to exhibit a reasonable knowledge of the law; and to truthfully inform the magistrate of all the facts.

The record clearly demonstrates that Trooper Riner did no independent investigation into the circumstances he alleged in his affidavit as supporting probable cause. Because of questions relating to the expiration of the rental contract, certain simple inquiries not only "could reasonably be expected," *Sheppard*, 468 U.S. at 989, but could have been accomplished immediately and easily by telephone. Trooper Riner could have established the status of Petitioner's rental car and learned that it was not overdue, contrary to Riner's assertion in the affidavit (T. 72). He could have telephoned Petitioner's parents in Florida and an airline to determine if the alleged inconsistencies in Petitioner's story were innocent, thereby destroying another key assertion in the affidavit.

Second, in contrast to the *Leon* consultation with "several Deputy District Attorneys," *Leon*, 468 U.S. at 904, 904 n.4., Trooper Riner's consultation did not concern the most crucial portion of his affidavit, the probable cause portion (T. 73-76). Instead, the trooper told the district attorney, "I had a car that I felt I had probable cause to search" (T. 73), and asked advice only about mechanical sections of the application, those describing the property

to be searched and the evidence or contraband for which to look (T. 74).

Riner apparently did not realize that his affidavit was totally deficient as to each "fact" set forth to add up to probable cause and that the search warrant issued on that affidavit was invalid, as the district court concluded in its review (App. 20a). It cannot be argued that Riner displayed reasonable knowledge of the law when he offered toward probable cause an incomplete, misleading statement about the expiration of Petitioner's car-rental lease (App. 22a). Nor should a reasonably trained officer believe that a person can lose his Fourth Amendment rights against warrantless searches simply by asserting those rights (App. 22a), *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988), or by exhibiting nervousness in a police-citizen confrontation of an accusatory nature, *United States v. Brown*, 731 F.2d 1491 (11th Cir. 1984). As the district court noted in its Order, "Nervousness . . . [is] not sufficient to establish probable cause . . . 'especially because being stopped and questioned by police officers could be alarming even to the innocent.'" (App. 21a, quoting *Brown*, 731 F.2d at 1494).

Trooper Riner did not even comply with the mechanics of established search warrant procedure in the State of Georgia. He was required to complete under oath a written return of service and deliver the document to any judicial officer. Official Code of Georgia § 17-5-29 (1982). He also should have delivered a copy to the person searched. O.C.G.A. § 17-5-25 (1982). Riner did neither. While failure to comply with these provisions is not fatal under Georgia law, *Holloway v. Georgia*, 134 Ga. App. 498 (1975), 215 S.E.2d 262, the officer's neglect further indicates his lack of objective reasonableness and his lack of knowledge of the law governing searches.

2. "*Objective good faith.*" The interweaving in *Leon* of the concepts of "objectively reasonable behavior" of a "reasonably well trained officer" as being indicative of "objective good faith" makes it difficult, in the absence of precise definitions, to delineate just what standards of behavior and levels of training go toward a showing of objective good faith. Examples of the mingling of the concepts in *Leon* show the overlap: "when law enforcement officers have acted in objective good faith or their transgressions have been minor," *Leon*, 468 U.S. at 908, and "[t]he objective standard we adopt . . . requires officers to have a reasonable knowledge of what the law prohibits," *id.* at 919 n.20. This Court's approving quotation from Professor Jerold Israel describes "police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits" as an example of programs "now viewed as an important aspect of police professionalism" that will not be eliminated by an objective good faith exception. *Id.* But the criteria of minor transgressions, reasonable knowledge, and training in Fourth Amendment limits have to be extrapolated from this Court's language, and the lists lower courts come up with are bound to be incomplete variations of what this Court intended to convey by "objective good faith."

Left to themselves, lower courts have found widely varying circumstances to indicate objective good faith and have applied inconsistent tests for the sufficiency of the showing of objective good faith. *See, e.g.*, *United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985) ("nothing more that the officer could have or should have done under these circumstances"); *United States v. Merida*, 765 F.2d 1205, 1214 (5th Cir. 1985) (presence of a warrant normally suffices to establish objective good faith); *United States v. Strand*, 761 F.2d 449

(8th Cir. 1985) (no objective good faith found when facts did not match those in *Leon* and *Sheppard*); *United States v. Merchant*, 760 F.2d 963, 968-69 (9th Cir. 1985), *cert. dismissed*, 480 U.S. 615 (1987) (objective reasonableness lacking when search was subterfuge for conducting criminal investigation; subjective good faith not enough).

It would seem that the standard employed in *Merida* is too permissive, while that in *Strand* is too restrictive. Reference to a knowledge-and-behavior checklist would be useful. In Petitioner's case, neither the district court nor the Eleventh Circuit articulated a definition of objective good faith or an analysis of the officer's conduct as indicative of good faith (other than that he sought a search warrant). More important, the courts below did not deal explicitly with the clear indications of Trooper Riner's lack of objectively reasonable behavior, such as his failure to investigate and his failure to inquire about the sufficiency of his showing of probable cause, and what these failures revealed about the presence of objective good faith.

More specifically addressing reasonable knowledge of the law, courts have required officers to meet varying thresholds of what constitutes "a reasonable knowledge of what the law prohibits," *Leon*, 468 U.S. at 919 n.20. *See, e.g.*, *United States v. Hale*, 784 F.2d 1465, 1470 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986) (requiring police officers to know "well-established current law"); *United States v. Weinstein*, 762 F.2d 1522, 1531 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986) (approving, as show of good faith, officer's "respect for the judicial limitations upon his authority to search"); *United States v. Savoca*, 761 F.2d 292, 297-98 (6th Cir.), *cert. denied*, 474 U.S. 582 (1985) (implying considerable familiarity with Fourth Amendment case law); *Arkansas v. Anderson*, 256 Ark. 58, 688 S.W.2d 947, 950 (Ark. 1985) (rules of criminal procedure "should

be common knowledge" to officers). *But cf. Malley v. Briggs*, 475 U.S. 335, 346, 346 n.9 (1986) (rule requiring police officer to exercise reasonable professional judgment "in no way 'requires the police officer to assume a role even more skilled'" than magistrate's role); *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985) (law enforcement officers' knowledge and understanding and their "appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers").

Petitioner respectfully asks this Court to set workable standards by which to measure "objectively reasonable behavior" of a "reasonably will trained officer." Such standards could include requiring that officers' conduct comport with state or federal rules of criminal procedure, with pertinent statutes, and with Fourth Amendment case law. An officer's apparent efforts to meet such objective standards could then be taken as a measure of his good faith.

3. *Misleading statements in search warrant affidavit.* In *Leon*, this Court held that the good faith exception would not apply where the affidavit upon which a search warrant was issued contained false or misleading information. *Leon*, 468 U.S. at 923. Although this Court referred to *Franks v. Delaware*, 438 U.S. 154 (1978), in enunciating this limitation on the good faith exception, a careful look at this question indicates that more is at issue here than a straightforward *Franks* analysis. Nonetheless, the majority of lower courts, have mechanically applied the procedure in *Franks* to cases in which the good faith exception is involved. After deciding if statements in the affidavit (or omissions therefrom) were false or recklessly made, the court considers whether, if the statements or omissions were corrected, the affidavit would still support a finding of probable cause. See, e.g., *United States v.*

Thomas, 793 F.2d 957, 961-62 (8th Cir. 1986); *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984); *Lincoln v. Arkansas*, 285 Ark. 107, 685 S.W.2d 166 (Ark. 1985); *Idaho v. Schaffer*, 107 Idaho 812, 693 P.2d 458, 468 (Idaho Ct. App. 1984); *McCary v. Virginia*, 228 Va. 219, 321 S.E.2d 637 (Va. 1984).

A contrasting approach taken by the district court in *United States v. Boyce*, 601 F. Supp. 947 (D. Minn. 1985), would seem to be far more faithful to this Court's intentions in creating the good faith exception. The *Boyce* court recognized that "the starting point in *Franks* is always a search warrant which on its face supports a finding of probable cause." *Boyce*, 601 F.Supp. at 955. But in *Boyce*, as in Petitioner's case, the search warrant affidavit did not on its face establish probable cause. So, the *Boyce* court observed, "when the affidavit fails to establish probable cause in the first place, reviewing the adjusted affidavit for probable cause is a meaningless exercise." *Id.*

> The *Leon* court's failure to mention the concept of materiality to the probable cause determination or the warrant adjusting process of *Franks* is understandable because the Supreme Court assumed that it was reviewing an affidavit which on its face, failed to establish probable cause. . . . The Court therefore concludes that once a reviewing court finds a search warrant to be dishonest or reckless, suppression is appropriate under *Leon* regardless of whether or not the misrepresentation or omission would be material under *Franks*.
>
> Finally, the Court notes that after a finding that [affiant] recklessly prepared the search warrant affidavit, his objective good

> faith reliance on the warrant is no longer at issue.

Boyce, 601 F.Supp. at 955 (footnote omitted). *See also United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir.), *cert. denied*, 482 U.S. 905 (1987) (suppression appropriate when officers were reckless in not including in affidavit information known or easily accessible to them).

The record in Petitioner's case provides an especially appropriate factual context for clarifying this critical aspect of the good faith exception. The district court's holding that Trooper Riner was neither dishonest nor reckless in including the admittedly false information concerning the expiration of the rental contract in the affidavit (App. 24a) is contradicted by that same court's other findings: that the rental agreement had not expired (App. 14a, n.1); that the trooper could have easily verified this information with the car rental company (App. 22a); and that the magistrate relied on the incorrect lease expiration date in issuing the warrant (App. 21a). Further, Riner's own testimony at the hearing on the motion to suppress established conclusively that, when he submitted the affidavit under oath to the magistrate, he knew that it was false (T. 42-43).

This behavior precludes a finding of good faith. His affidavit contained crucial inaccuracies; the truth about the rental car and about Petitioner's allegedly inconsistent stories was immediately and easily accessible to the officer; and the magistrate was misled in her determination of probable cause.

To employ a *Franks* analysis in the context of a good faith analysis is contrary to this Court's intention in *Leon*. In Petitioner's case, as in *Boyce*, the courts were "reviewing an affidavit which on its face, failed to establish probable cause." *Boyce*, 601 F.Supp. at 955. Petitioner

submits that his situation follows *Leon* and that "[s]uppression therefore remains an appropriate remedy if the magistrate or judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Leon*, 468 U.S. at 923. The lower courts have gone far astray in their interpretations of this Court's meaning in *Leon* as to this critical aspect, and guidance is needed to correct this misreading.

4. *"So lacking in indicia of probable cause."* Another limitation on the good faith exception applicable to Petitioner's case is that objective good faith cannot be found if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citations omitted). Aside from articulating this "so lacking" exception, this Court did little to explicate just how lacking in probable cause an affidavit would have to be to activate the "so lacking" limitation or, in fact, what was meant by "so lacking."

The cases since *Leon* indicate the range of possible interpretations of this limitation. On one extreme is the category of cases where, under the totality of the circumstances test set out in *Illinois v. Gates*, 462 U.S. 213 (1983), probable cause does exist. In most of these cases, the officers had conducted a detailed investigation as in *Leon*, 468 U.S. at 901, 902, 904 n.4. *See, e.g., United States v. Edwards*, 798 F.2d 686 (4th Cir. 1986); *United States v. Medlin*, 798 F.2d 407 (10th Cir. 1986); *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985); *United States v. Gant*, 759 F.2d 484 (5th Cir.), *cert. denied*, 474 U.S. 851 (1985).

The other extreme is represented by the "'bare bones' affidavit" case described in *Gates*, 462 U.S. at 239;

see also Leon, 468 U.S. at 923 n.24. At this end of the continuum, the affidavit contains so few facts that it can be described as "bare bones." *See, e.g., United States v. Barrington*, 806 F.2d 529, 531 (5th Cir. 1986); *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985).

Between these two extremes is Petitioner's case, which presents the far more difficult question of whether, though the facts fall short of the "substantial basis" standard for review of probable cause enunciated in *Gates*, 462 U.S. at 239, they are yet not "so lacking" in indicia of probable cause as to qualify for *Leon*'s good faith exception to the exclusionary rule. *See Idaho v. Schaffer*, 107 Idaho 812, 693 P.2d 458, 468 (Idaho Ct. App. 1984). *See also* Note, *Application Problems Arising from the Good Faith Exception to the Exclusionary Rule*, 28 Wm. & Mary L. Rev. 743, 758-66 (1987).

It is apparent that the lower courts sorely need guidance in interpreting this and other aspects of the good faith exception. One commentator, reviewing the cases that have been decided since *Leon*, decried the "inconsistent applications of the [good faith exception] by circuit courts and state supreme courts" and said the inconsistencies "must be eliminated":

> The Supreme Court must not allow the inconsistencies that can and do result from these . . . ambiguities in the good faith exception to continue. The divergence in the applications is so great that evidence admissible in one jurisdiction would, in some cases, be inadmissible in another. Because the good faith exception is closely related to the fourth amendment rights of all persons, courts must apply the good faith exception uniformly.

Note, *Application Problems*, 28 Wm. & Mary L. Rev. at 767. In the interests of due process and of preservation of the Fourth Amendment, Petitioner respectfully requests this Court to interpret *Leon*'s ambiguities and give lower courts precise direction on how to apply the good faith exception to the exclusionary rule.

II. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE APPLICATION OF THE "REASONABLE JURIST" TEST OF *LEON* IN DETERMINING WHETHER AN OFFICER'S RELIANCE ON AN INVALID SEARCH WARRANT IS OBJECTIVELY REASONABLE.

In the closing paragraph of *United States v. Leon*, 468 U.S. 897 (1984), this Court announced a test to be used to determine whether officers' reliance on a search warrant is objectively reasonable. *Id.* at 926. The test, which has come to be known as the "reasonable jurist" test, holds that an officer may rely on a more-than-"bare-bones" affidavit, "relat[ing] the results of an extensive investigation," when the affidavit:

> . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Leon, 468 U.S. at 926. This is the test to separate cases where the good faith exception applies from cases where

evidence should be suppressed by the exclusionary rule because the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citations omitted). Under this test, evidence would have been suppressed in Petitioner's case because no thoughtful and competent judge could have disagreed that the search warrant lacked probable cause.

The search warrant in Petitioner's case relied on four factors in support of probable cause. In its Order the district court analyzed each factor and determined unequivocally that none supported any finding of probable cause (App. 21a-22a). Viewing the affidavit as a whole, that court found no substantial basis to conclude that probable cause existed under *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (App. 20a). On the basis of the record below, no thoughtful and competent judge could disagree with the district court's determination as to the lack of probable cause in the affidavit. Nor did the Government contest the district court's ruling on probable cause, and the court of appeals did not differ with that ruling. *United States v. Taxacher*, 902 F.2d 867, 870 (11th Cir. 1990) (App. 1a-12a). This unanimity shows that there was not "evidence sufficient to create disagreement among thoughtful or competent judges as to the existence of probable cause," *Leon*, 468 U.S. at 926, and therefore that the officer's reliance on the warrant was not objectively reasonable.

The Eleventh Circuit Court of Appeals rejected Petitioner's reliance on this reasonable jurist test, which it called "appellant's proposed test" (App. 8a). Instead, the panel indicated its intention to "subscribe to a standard which is focused on a reasonably well-trained officer and is based upon the totality of the circumstances" (App. 9a-10a). The court called the reasonable jurist test merely an

"observation" by this Court, stating:

> This observation, however, was merely intended to bolster the Court's holding that the officer had acted reasonably under the circumstances; *Leon* did not establish a 'reasonable jurist' test as the threshold.

(App. 8a-9a). The court conceded in a footnote that "[o]ther courts have also used the 'reasonable jurist' standard, but not as a threshold test" (App. 9a, n.4).

Among those other courts relying on this Court's explication of the reasonable jurist test in *Leon*, 468 U.S. at 926, are the courts of appeals in the Second, Eighth, and Ninth Circuits, all of whom see the reasonable jurist test as a test, not just an observation or standard, for determining objective reasonableness. The Eleventh Circuit is in square and irreconcilable conflict with those circuits on this issue.

In the Second Circuit, the court reversed an order suppressing evidence by observing the disagreement among judges involved at various stages of the case and found that the narcotics agent had an objectively reasonable belief that the probable cause for a search existed because "the affidavit 'provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable.'" *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985), quoting *Leon*, 468 U.S. at 926.

The Eight Circuit also outlined disagreement among lower court judges before it nevertheless found objectively reasonable reliance on a warrant. *United States v. Martin*, 833 F.2d 752, 756 (8th Cir. 1987), *cert. denied*, 487 U.S. 1221 (1990). "When judges can look at the same affidavit and come to differing conclusions, a police

officer's reliance on that affidavit must, therefore, be reasonable." *Id. See also United States v. Sager*, 743 F.2d 1261, 1266 (8th Cir. 1984). ("Although the panel was unanimous, the District Court went the other way, so it must be said here, as it was in *Leon*, that '[t]he affidavit . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause'").

Similarly, the Ninth Circuit has employed the reasonable jurist test:

> We agree . . . that the affidavit . . . in support of this search warrant was so deficient that any official belief in the existence of probable cause must be considered unreasonable. The test for reasonable reliance is whether the affidavit was sufficient to 'create disagreement among thoughtful and competent judges as to the existence of probable cause.'

United States v. Hove, 848 F.2d 137, 139 (9th Cir. 1988) (citing *Leon*, 468 U.S. at 926. *See also United States v. Tate*, 795 F.2d 1487, 1491 (9th Cir. 1986) (when evidence in affidavit sufficient to create disagreement among judges, "the Supreme Court has clearly stated that exclusion of the evidence is not generally justified").

By characterizing the reasonable jurist test as "appellant's proposed test" (App. 8a) and as this Court's "observation" (App. 8a), and by substituting a totality of the circumstances standard (App. 10a), the Eleventh Circuit denied Petitioner a powerful and workable method whereby a trial court could decide whether to apply the good faith exception or if instead a warrant is based on an affidavit too lacking in probable cause to be believed. *Leon*, 468 U.S. at 923.

The appeals court's preferred standard focusing on "a reasonably well-trained officer" and "the totality of the circumstances" (App. 10a) unnecessarily dilutes the "so lacking" limitation mandated by this Court in *Leon*, 468 U.S. at 923. Petitioner does not advance the reasonable jurist test as a threshold test (App. to 9a, 9a, n.4). Rather, Petitioner respectfully asks this Court to apply the "so lacking" limitation on a probable cause finding in the meaningful manner this Court set out in the reasonable jurist test in *Leon*, 468 U.S. at 926. Such a clarification also would resolve the conflict among the circuits, telling the lower courts whether what looks like a test, sounds like a test, and has been used as a test really is a test. To not speak on this question will be to allow the good faith exception to effectively eliminate any requirement of probable cause under the Fourth Amendment, a result this Court took pains in *Leon* to emphasize was not its intention. *See Leon*, 468 U.S. at 924.

III. THE APPEALS COURT WRONGLY DECIDED PETITIONER'S CASE WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS WITHOUT CONSIDERING ALL OF THE CIRCUMSTANCES IN THE RECORD.

The Eleventh Circuit concluded its affirmance of Petitioner's conviction by saying that its decision was reached "[a]fter a careful review of all the circumstances" of the case. *United States v. Taxacher*, 902 F.2d 867, 873 (11th Cir. 1990) (App. 11a). The court's omission from its "Background" section (App. 2a-5a) of some critical facts calls that assertion into question, as do its judgments about Trooper Riner's objective reasonableness, good faith, and claims as to probable cause. A look at the significant omissions and factors overlooked in assessing

the officer's objective reasonableness and good faith and his probable cause indicia will show how the outcome for Petitioner might have changed especially if the appeals court confronted the inaccuracies of the affidavit.

1. *Significant omissions.* The Eleventh Circuit does not take note of the speed with which Trooper Riner's first-ever search warrant application took place. The traffic stop of Taxacher occurred at 8:24 a.m.; Officer Riner had the signed search warrant in hand by 9:15 a.m. (App. 17a, n.2). In those fifty-one minutes the following occurred: traffic stop; questioning of Petitioner and start of search of his car; drive to the sheriff's office; officer's brief consultation with the district attorney; application for search warrant; eight-minute conference with magistrate; and issuance of warrant. (App. 17a, n.2).

The court below did not note that Trooper Riner's brief call to the district attorney was for only technical advice on how to fill out application; the call did not inquire about the substance of the affidavit Riner was preparing or about the sufficiency of his showing of probable cause (T. 34-35, 75, 77).

Similarly the court of appeals gave short shrift to the significance of the trooper's failure to verify or reveal to the magistrate Petitioner's explanation of the past-due rental car agreement: "The rented automobile was not past due, as Taxacher had in fact secured an extension of the rental agreement. Riner did not attempt to verify Taxacher's explanation until after the search warrant had been obtained." (App. 4a, n.1).

2. *Objective reasonableness and good faith.* The court below did not notice the disparity between its observation about Riner's failure to check on the status of Petitioner's rental car, (App. 4a, n.1) and its reference to

"'objectively reasonable law enforcement activity'" (App. 6a), as against the court's assertion that "[o]ur review of the record persuades us that there is ample evidence to support the district court's finding" that "Riner acted neither recklessly nor dishonestly in submitting his affidavit" (App. 7a). The court did not juxtapose Trooper Riner's total failure to conduct any sort of investigation with the much-heralded "extensive investigation" contributing to probable cause in *Leon*, 468 U.S. at 921, 926, a depth of investigation that is often cited as a model. Nor did the court see fit to quote the language of the suggested definition of objective reasonableness in the companion case to *Leon*, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), as including an officer taking "every step that could reasonably be expected of [him]," *id.* at 989, although the court did cite to that page (App. 10a).

Curiously, the court below noted as "indicative of objective good faith" (App. 10a) Trooper Riner's consultation with the district attorney, a consultation that, as the record reflects (T. 73, 74), pertained only to the first two subsections of the affidavit describing the property to be searched and the evidence to be sought. The trooper sought no advice regarding the sufficiency of his probable cause showing. Yet the court explicitly relied on *Sheppard*, *Taxacher*, 902 F.2d at 872, a case where the detective had shown his affidavit to "the District Attorney, the District Attorney's first assistant, and a sergeant, who all concluded that it set forth probable cause." *Sheppard*, 468 U.S. at 985.

The court of appeals was equally silent about an aspect of one of its own cases on which it based its *de novo* review of "[t]he ultimate issue of objective good faith," *United States v. Accardo*, 749 F.2d 1477, 1481 (11th Cir.) *cert. denied*, 474 U.S. 949 (1985) (App. 7a). The court did not connect with Petitioner's case that in *Accardo* it

decided that agents had acted in good faith because they "took every step that could reasonably be expected of them," *Accardo*, 749 F.2d at 1480, adopting *Sheppard*'s standard of objective reasonableness. To have held Trooper Riner to this standard would have eliminated the past-due rental car contention, as well as the "inconsistent and implausible explanations" contention, as contributing to probable cause.

3. *Probable cause.* In Petitioner's case there is no doubt that the affidavit clearly fails to meet even the relaxed totality of the circumstances standard for probable cause set out in *Illinois v. Gates*, 462 U.S. 213 (1983) (App. 20a). As such, the district court determined that not even a "substantial basis" existed for the magistrate's finding that there was a "fair probability" or "substantial chance" that Petitioner's car contained contraband. Yet that court also determined that the affidavit was not "so lacking" in probable cause as to render *Leon* inapposite (App. 24a). The Eleventh Circuit concurred (App. 10a).

The district court concluded that the magistrate relied on four bases for its determination of probable cause:

> (1) defendant appeared overly nervous; (2) the rental agreement indicated that the car was past due; (3) defendant gave inconsistent stories about his travel plans; and (4) defendant initially consented to a search of the vehicle, then withdrew consent when the officer asked to look into a specific satchel.

(App. 21a).

Regarding points (1) and (3), Petitioner's

nervousness and inconsistent responses, the district court correctly concluded that these "are not sufficient to establish probable cause" (App. 21a). *See United States v. Brown*, 731 F.2d 1491, 1494 (11th Cir. 1984); *Moya v. United States*, 761 F.2d 322, 325-26 (7th Cir. 1985). It was apparent from the officer's and Petitioner's testimony that the details of Petitioner's itinerary added up and that the officer could have verified them with two or three simple telephone calls (T.8, 15). The court of appeals duly noted that Trooper Riner "did not attempt to verify [Petitioner's] explanation until after the search warrant had been obtained" (App. 4a, n.1), then apparently decided to overlook that oversight.

The second basis for probable cause involved Petitioner's rental car agreement. The officer's statement in the affidavit that Petitioner's vehicle "should have been returned" some time earlier (App. 17a), was simply false. The truth of the matter, the district court observed, was already known by the officer and confirmation readily available (App. 22a). In any case, an overdue rental car does not create any logical inference that the vehicle contains contraband (App. 22a).

As for the fourth basis, the district court concluded: "[D]efendant's invocation of his Fourth Amendment right does not provide probable cause to search" (App. 22a). *See United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988) (defendant's refusal to consent to a search cannot establish probable cause). *See also Brown v. Texas*, 443 U.S. 47, 52 (1979) (probable cause not established by invocation of Fifth Amendment right).

The Eleventh Circuit touched on only three of the four elements Trooper Riner put forth as supporting his probable cause (App. 10a-11a), apparently endorsing them despite earlier recognition that "there was insufficient probable cause to justify the search of Taxacher's car.

Thus, we must assume that the search warrant was issued and executed in violation of the Fourth Amendment." (App. 5a). As to the fourth basis, the court states in a footnote:

> While we consider the unusual revocation of consent on these facts as one of the factors arousing Officer Riner's suspicions, we note that 'a defendant's refusal to consent to a search cannot establish probable cause.'

(App. 11a, n.6, citing *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988)). The court noted that prohibition and still allowed the "unusual revocation of consent" to contribute to Trooper Riner's probable cause. Had the court followed its own caveat in *Alexander*, that "a defendant's refusal to consent to a search cannot establish probable cause," *Alexander*, 835 F.2d at 1409 n.3, and combined it with a conscientious handling of the past-due rental car agreement, what would have survived would have been an affidavit unacceptable for its dependence only on "inconsistent and implausible explanations" and "nervousness."

This review of the affidavit shows that each of the four factual legs on which it sought to stand was invalid; not one constituted or contributed to any reasonable inference that Petitioner's car contained contraband and that there was probable cause to search it. Petitioner's case is not one presenting a mere technical error, nor is it one where the mistakes made are attributable solely to the issuing magistrate. Trooper Riner's entire course of conduct was not objectively reasonable, and the affidavit he submitted to obtain the search warrant for Petitioner's car was bereft of probable cause.

The officer's conduct in obtaining the search

warrant was such that application of the exclusionary rule is not only appropriate but necessary if such conduct is to be deterred, *Leon*, 468 U.S. at 916, and if the requirements of the Fourth Amendment are to continue to be enforced in a meaningful fashion, *id.* at 924.

CONCLUSION

In light of the substantial issues raised, Petitioner respectfully prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

James K. Jenkins
MALOY & JENKINS
600 Grant Building
44 Broad Street
Atlanta, Georgia 30303
(404) 522-9400

Attorneys for Petitioner
Dennis L. Taxacher

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Dennis L. TAXACHER,
Defendant-Appellant.

No. 88-8596

United States Court of Appeals,
Eleventh Circuit.

June 4, 1990.

Before VANCE* and ANDERSON, Circuit Judges, and LYNNE,** Senior District Judge.

ANDERSON, Circuit Judge:

Dennis L. Taxacher pled guilty to one count of violating the Travel Act, 18 U.S.C. § 1952. He received a 41-month sentence. On appeal, Taxacher claims that the

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* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989, did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

district court improperly denied his motions to suppress. In addition, he argues that the sentencing court erred by refusing to reduce his base offense level under the Federal Sentencing Guidelines ("Guidelines"). We find both of these claims without merit, and, accordingly, affirm.

I. BACKGROUND

On November 7, 1987, Taxacher was stopped for speeding while driving south on U.S. Interstate 95 in McIntosh County, Georgia. After stopping Taxacher, Georgia State Patrol Trooper Barry A. Riner requested that he step out of the automobile and produce his driver's license and vehicle registration. Taxacher produced a Pennsylvania driver's license and a rental agreement for the automobile. Riner noticed that, under the terms of the rental agreement, the automobile should have been returned three weeks earlier on October 17, 1987. Taxacher said that he had received an extension on the car and showed Riner a receipt for a deposit of $500.00 made on November 2, 1987. The receipt did not state the purpose of the deposit or whether the rental agreement had been extended.

His suspicion aroused, Riner began asking Taxacher questions about the origin, destination, and purpose of his travel. Taxacher grew increasingly nervous during the questioning. He initially stated that he was travelling to Fort Pierce, Florida to visit his parents. Upon further questioning, Taxacher explained that he had flown from Pennsylvania to Fort Lauderdale, Florida, where he rented the automobile. After renting the car, Taxacher drive to his parents' home in Fort Pierce to visit with them. Taxacher said that he then drove back to Pennsylvania to winterize his parents' home. Taxacher also stated that at the time of his arrest, he was driving

back to Fort Lauderdale to return the rental automobile before flying back to Pennsylvania.

Riner believed that Taxacher's answers were inconsistent and asked him for permission to search the automobile. Although Taxacher orally agreed to the search, he refused to sign a written consent-to-search form. After consenting to the search, Taxacher attempted to lead Riner to the passenger compartment of the automobile. Riner looked through the passenger area of the vehicle, then asked Taxacher to open the trunk. Taxacher complied with the request, but did not allow Riner complete access to the contents of the trunk. Instead, Taxacher stood between Riner and the trunk in such a manner that Riner could view but not actually touch the contents. Riner observed a hang-up clothes bag, satchel, and two plastic bags in the trunk. When Riner asked him what the satchel contained, Taxacher "really and truly looked like he was going to faint." R. 2:19. After Riner asked if he could examine the contents of the satchel and reached toward it, Taxacher slammed the trunk and told him that no further search would be made without a search warrant. Riner then directed Taxacher to follow him to the McIntosh County Sheriff's Office to post a cash bond for the speeding violation.

En route to the sheriff's office, Riner contacted the office and requested that a magistrate be made available so that he could apply for a search warrant. Just before arriving at the sheriff's office, Riner was informed that Taxacher's Virginia driver's license had been suspended and not reinstated. Taxacher was detained for the speeding violation and driving with a suspended license.

Riner, who had not before filled out an application for a search warrant, telephoned the local district attorney for advice. Riner then completed a search warrant application. In his affidavit accompanying the warrant

application, Riner stated that (1) the defendant appeared overly nervous; (2) the rental agreement indicated that the car was past due; (3) the defendant gave inconsistent stories about his travel plans; and (4) the defendant initially consented to a search of the vehicle, then withdrew consent when the trooper asked to look into a specific satchel. Riner did not mention either the receipt of the deposit of $500 or Taxacher's statement that he had extended the rental agreement.[1]

Based on Riner's affidavit, the magistrate for McIntosh County issued a search warrant authorizing the search of "all contents and baggage" in the vehicle driven by Taxacher. The contraband to be searched for was listed as "marijuana, cocaine, and any other items which are illegal to possess under the Ga. Controlled Substances Act. And, any money that may be used or may have been used in connection with drugs."

Riner searched Taxacher's car and the contents therein, discovering $186,626.00 in cash in the satchel. Riner then notified Georgia Bureau of Investigation Agent James A. Evans of this finding. After arriving at the sheriff's office, Evans searched the automobile before seizing it, and then placed Taxacher under arrest for violation of the Travel Act. Later that day, after he had been informed of his *Miranda* rights, Taxacher signed a waiver of these rights and voluntarily agreed to make a statement. During the interrogation by Evans that followed, Taxacher made incriminating statements. Taxacher was charged with one count of money laundering and two counts of violating the Travel Act.

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[1] The rented automobile was not past due, as Taxacher had in fact secured an extension of the rental agreement. Riner did not attempt to verify Taxacher's explanation until after the search warrant had been obtained.

Taxacher subsequently filed motions to suppress both the evidence discovered during the search of his car and the statements he made after the search. The district court found the warrant invalid because Riner did not have sufficient probable cause to search and detain Taxacher's vehicle. The court found that the magistrate had issued the search warrant in reliance on the four factors set forth by Riner in his affidavit, none of which, alone, constituted sufficient probable cause. However, despite the warrant's invalidity, the court denied the motions to suppress the illegally obtained evidence, holding that the good faith exception to the exclusionary rule applied. Taxacher then pled guilty to one count of violating the Travel Act, reserving his right to appeal the denial of the motions. *See* Fed.R.Crim.P. 11(a)(2).

At the sentencing hearing, the government recommended that Taxacher's sentencing offense level be reduced by four points because he was a "minimal participant." The probation department recommended a reduction of two levels because Taxacher was a "minor participant." Despite these recommendations, the sentencing court found that the appellant was not entitled to a reduction and required him to submit further evidence of his role as a "minimal" or "minor" participant. Taxacher chose not to put on additional evidence. The sentencing court refused to reduce the offense level and sentenced Taxacher to 41 months.

II. GOOD FAITH

The government does not contest the district court's ruling that there was insufficient probable cause to justify the search of Taxacher's car. Thus, we must assume that the search warrant was issued and executed in violation of the Fourth Amendment. The issue before us now is

whether the district court correctly applied the good faith exception to the exclusionary rule, rendering the improperly obtained evidence admissable [sic]. *See United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). We affirm.

In *Leon*, the Supreme Court recognized a good faith exception to the exclusionary rule for searches conducted pursuant to warrants. Observing that the purpose of the exclusionary rule is to deter unlawful police conduct, the Court found that this purpose would not be served, and the rule should not be applied, when officers engage in "objectively reasonable law enforcement activity." 468 U.S. at 918-19, 104 S.Ct at 3418. In particular, the Court held that the suppression of evidence would have no deterrent effect "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920, 104 S.Ct at 3419 (footnote omitted).[2]

Although it stated that searches conducted pursuant to warrants will rarely require suppression, the *Leon* Court did list four situations in which suppression would still be appropriate. *Id.* at 923, 104 S.Ct. at 3421. These situations are (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," (2) "where the issuing magistrate wholly abandoned his judicial role," (3) where the "warrant [is] based on an affidavit 'so lacking in indicia of probable cause as to render official

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[2] The *Leon* Court also stated that "the marginal or nonexistent benefits produced by suppression evidence obtained on objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922, 104 S.Ct at 3420.

belief in its existence entirely unreasonable,'" and (4) where "a warrant [is] so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.* (citations omitted).

Appellant argues that the first and third limitations listed above preclude the application of the good faith exception in this case. The first limitation is negated by the district court's finding that Riner acted neither recklessly nor dishonestly in submitting his affidavit. This finding is subject to review on appeal under the clearly erroneous standard. *United States v. Cancela,* 812 F.2d 1340, 1343 (11th Cir.1987) Our review of the record persuades us that there is ample evidence to support the district court's finding. The finding is not clearly erroneous.

Appellant also asserts that the search warrant was "so lacking in indicia of probable cause" that Riner's reliance on it was "entirely unreasonable." The ultimate issue of objective good faith is a legal question which we review *de novo. United States v. Accardo*, 749 F.2d. 1477, 1481 (11th Cir.1985).[3]

In deciding whether or not the warrant was "so lacking," appellant would have us apply a standard that focuses on whether the affidavit presented evidence sufficient to create disagreement among thoughtful and competent judges. Under this test, an officer's reliance on a warrant would be objectively reasonable only if the affidavit presents enough evidence to create disagreement among reasonable jurists as to the existence of probable cause. A Ninth Circuit panel employed this test in *United*

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[3] The underlying facts on which the legal questions is based would be reviewed under the clearly erroneous standard. *Accardo*, 749 F.2d at 1481. In this case, however, there is no dispute as to the underlying facts.

States v. Hove, 848 F.2d 137, 139 (9th Cir.1988) (citing *Leon*, 468 U.S. at 926, 104 S.Ct at 2422).

We reject appellant's proposed test. Our reading of *Leon* persuades us that the proper test is whether the *officer* acted in objective good faith under all the circumstances. The focus in *Leon* is on the officer. "[T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable. . . ." *Leon*, 468 U.S. at 922, 104 S.Ct at 3420. The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances . . . may be considered." *Id.* at 922 n. 23, 104 S.Ct. at 3420 n. 23. *See also Illinois v. Krull*, 480 U.S. 340, 355, 107 S.Ct. 1160, 1170, 94 L.Ed.2d 364 (1987) ("Nor can a law enforcement officer be said to have acted in good faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional."); *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir.1985) ("the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers").

It is true that in *Leon* the Court observed that reasonable jurists had disagreed about whether there was probable cause on the facts of that case. 468 U.S. at 926, 104 S.Ct. at 3422. This observation, however, was merely intended to bolster the Court's holding that the officer had acted reasonably under the circumstances; *Leon* did not

establish a "reasonable jurist" test as the threshold.[4] If a reasonable jurist could believe in objective good faith that there was probable cause, obviously a reasonably well-trained officer could believe likewise. However, because a reasonable jurist has more legal training than a reasonably well-trained officer, what would be reasonable for a well-trained officer is not necessarily the same as what would be reasonable for a jurist. *See Malley v. Briggs*, 475 U.S. 335, 346 n. 9, 106 S.Ct. 1092, 1098 n. 9, 89 L.Ed.2d 271 (1986).[5]

Thus, we subscribe to a standard which is focused

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[4] Other courts have also used the "reasonable jurist" standard, but not as a threshold test. *See United States v. Martin*, 833 F.2d 752, 756 (8th Cir.1987), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1793, 108 L.Ed.2d 794 (1990); *United States v. Tate*, 795 F.2d 1487, 1490-91 & n. 5 (9th Cir.1986); *United States v. Fama*, 758 F.2d 834, 838 (2d Cir.1985); *United States v. Sager*, 743 F.2d 1261, 1266 (8th Cir.1984).

[5] In *Malley*, the Supreme Court applied the *Leon* standard of objective reasonableness in determining the degree of qualified immunity accorded a defendant police officer in a damages action under 42 U.S.C. § 1983. 475 U.S. at 344-45, 106 S.Ct. at 1097-98. In applying that standard, the Court implicitly recognized the difference between a reasonable jurist and a reasonable officer.

> It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no *officer* of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an *officer*. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

475 U.S. at 346 n. 9, 106 S.Ct. at 1098 n. 9 (emphasis added).

on a reasonably well-trained officer and is based upon the totality of the circumstances. Our standard comports with the language used in *Leon*, 468 U.S. at 922 n. 23, 104 S.Ct. at 3420 n. 23 ("whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization") ("all of the circumstances . . . may be considered"), and is also consistent with the purposes underlying the exclusionary rule and the good faith exception, *id.* at 916, 919, 104 S.Ct. at 3417, 3418 ("the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates") (the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity").

Applying this standard, we agree with the district court's legal conclusion; we conclude that Riner acted in objective good faith, and that the warrant was not so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable. In this case Officer Riner consulted with the local district attorney before seeking the search warrant, and then submitted the matter to a neutral magistrate. These steps are indicative of objective good faith. *See Massachusetts v. Sheppard,* 468 U.S. 981, 989, 104 S.Ct. 3424, 3428, 82 L.Ed.2d 737 (1984). Officer Riner was suspicious because of the inconsistent and implausible explanations given by appellant regarding his itinerary. He was suspicious as a result of appellant's excessive nervousness. That nervousness increased dramatically when the officer focused attention on the satchel and asked appellant what the satchel contained and if Riner could examine the contents of the satchel. Officer Riner's suspicions were aroused by the fact that appellant nearly closed the trunk of the vehicle on the officer's head, and by the unusual circumstance that

appellant, who had previously given his oral consent to search, precipitously revoked that consent and slammed the trunk down when the officer focused attention on the satchel and asked permission to search that particular object.[6]

After a careful review of all the circumstances, we conclude that Officer Riner acted in objective good faith and that the warrant was not so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable. Accordingly, we affirm the district court on this issue.

III. SENTENCING

Appellant also contends that the sentencing court erred by failing to decrease the base offense level. He asserts that he was either a "minimal participant" or a "minor participant" and thus was entitled either to a four-level reduction under § 3B1.2(a) of the Federal Sentencing Guidelines ("minimal participant")[7] or a two-level

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[6] While we consider the unusual revocation of consent on these facts as one of the factors arousing Officer Riner's suspicions, we note that "a defendant's refusal to consent to a search cannot establish probable cause." *United States v. Alexander*, 835 F.2d 1406, 1409 n. 3 (11th Cir.1988).

[7] The commentary notes state that § 3B1.2(a) is to be applied "infrequently" and only to defendants "who are plainly among the least culpable of those involved in the conduct of a group." As an example of a "minimal participant," the notes list "an individual (who) was recruited as a courier for a single smuggling transaction involving a small amount of drugs."

reduction under § 3B1.2(b) ("minor participant").[8]

We review the district court's determination of an offender's role under the clearly erroneous standard. *United States v. Erves*, 880 F.2d 376, 381 (11th Cir.1989). We conclude that the district court was not clearly erroneous in finding that Taxacher was not entitled to a reduction of his offense level.

Taxacher also contends that the district court erroneously placed upon him either the burden of persuasion or burden of production. Taxacher's claim of error fails on the facts of this case. Here the sentencing judge placed the burden of persuasion upon the government. Nevertheless, the sentencing court found that the evidence was insufficient to conclude that Taxacher was entitled to any reduction in the offense level.[9] Our review of the record persuades us that the sentencing judge was not in error.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[8] The commentary indicates that a "minor participant" is one "who is less culpable than most other participants, but whose role could not be described as minimal."

[9] In *United States v. Wilson*, 884 F.2d 1355, 1356 (11th Cir.1989), this court held that a defendant seeking to reduce his offense level through acceptance of responsibility has the burden of proving same. The court stated generally: "The guidelines contemplate that the government has the burden of proving the applicability of sections which would enhance the offense level and the defendant has the burden of proving the applicability of guideline sections which would reduce the offense level."

APPENDIX B

In the United States District Court,
Southern District of Georgia,
Brunswick Division.

UNITED STATES of America :

CRIMINAL ACTION

v. :

NO. 287-18

DENNIS L. TAXACHER :

ORDER

On November 7, 1987, the defendant, Dennis L. Taxacher, was stopped while driving south on Interstate 95. Subsequently, defendant's car was searched and he made statements to a Georgia Bureau of Investigation Agent.

Taxacher contends that the initial stop, continued detention and all subsequent searches and seizures of his person, vehicle and the contents of his vehicle were unreasonable, unlawful and in violation of his Fourth Amendment rights. Further, defendant contends that his statements were involuntary and obtained in violation of his Fourth and Fifth Amendment rights. Consequently, defendant moves to suppress all evidence obtained from the detention, search and seizure, including any statements made and any evidence discovered as a result of those statements.

The Court held an evidentiary hearing to consider defendant's motion and, for the following reasons,

defendant's motion will be denied. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On November 7, 1987, Dennis L. Taxacher was driving south on Interstate 95 in McIntosh County, Georgia. At approximately 8:24 a.m., Georgia State Patrol Trooper Barry Riner stopped defendant for a speeding violation. The trooper's radar showed that defendant was driving at a rate of 68 miles per hour in a 55 mile per hour speed zone.

2. The trooper asked defendant to step out of his vehicle and to produce a driver's license and vehicle registration. Defendant produced a Pennsylvania driver's license and a rental agreement on the car.

3. The rental agreement showed that the car was three weeks past due for return to the rental agency. Defendant stated that he had received an extension from the rental agency and produced a receipt showing that he had made a $500 deposit on the car five days previously. The receipt did not show the purpose of the deposit nor state that the rental contract had been extended.

4. The trooper was somewhat suspicious as to the status of the vehicle and, while he was writing out a speeding citation, asked defendant some questions about his place of departure, destination and purpose of travel in an attempt to clarify the discrepancy.[1] Defendant became increasingly nervous and gave inconsistent responses to the trooper's questions. Defendant's final explanation was that he had flown from Pennsylvania to

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[1] It was later determined that defendant had received an extension on his rental agreement and the motor vehicle registration was in fact valid.

Fort Lauderdale, Florida, rented the car and drove to his parents' house in Fort Pierce, Florida. According to defendant, he visited with his parents, then drove back to Pennsylvania to winterize their home. He was en route to Fort Lauderdale to return the rental car and planned to fly back to his home in Pennsylvania.

5. The trooper asked defendant for permission to search the car. Defendant hesitated, then agreed to the search and attempted to lead the trooper toward the passenger compartment. The trooper went to his patrol car to get a written consent-to-search form and presented it to defendant. Defendant refused to sign the form and again tried to lead the trooper toward the front of the car.

6. The trooper looked into the passenger compartment of the car, then asked to look in the trunk. Defendant opened the trunk and revealed a hang-up clothes bag, briefcase-type satchel and two plastic bags. When the trooper asked defendant what the satchel contained, defendant became pale and responded "personal items." The trooper asked if he could look into the satchel and reached toward it. Defendant shut the trunk and told the trooper that he would have to get a search warrant to search any further.

7. After this refusal, the trooper directed defendant to follow him to the sheriff's office in McIntosh County, Georgia, to post a cash bond for the speeding violation. The trooper also intended to attempt to obtain a search warrant for the vehicle and all of its contents.

8. Sometime during the highway stop, the trooper called in a driver's license check on defendant. The trooper also radioed the McIntosh County Sheriff's Office to arrange for a magistrate to meet the trooper at the office. Upon arriving at the sheriff's office, the trooper was informed that defendant's license had been suspended by the State of Virginia.

9. While defendant was detained for processing of the speeding citation and for driving with a suspended license, the trooper applied for a search warrant. The trooper had never filled out a search warrant application before, so he called the local district attorney for instructions.

10. The warrant application was for permission to search "all contents and baggage" in the vehicle driven by Taxacher. The contraband to be searched for was listed as: "marijuana, cocaine, and any other items which are illegal to possess under the Ga. controlled Substances Act. And, any money that may be used or may have been used in connection with drugs."

11. The facts tending to establish probable cause that a crime had been or was being committed or that the contraband was located in the vehicle were listed by the trooper as follows:

> "Vehicle stopped for speeding. During conversation, subject offered several inconsistent stories. Officer asked for consent to search. Verbal consent was given, but written consent was denied. Subject very nervous. Subject opened trunk of vehicle and state 'see, there is nothing there.' Then attempted to close trunk. Officer asked about luggage in trunk, and subject became very nervous and refused further search. The inconsistent stories are that subject stated that he was enroute to Ft. Pierce to visit his parents. But the vehicle was rented from Ft. Lauderdale, which is [the trooper thought 150 miles] south of Ft. Pierce, Fla. Also upon further conversation, subject stated that he had

> driven from Ft. Pierce, Fla. to Pa. and then was enroute back to Ft. Pierce. Rental agreement on the vehicle indicates that vehicle should have been returned on 10/17/87."

12. On the basis of this affidavit and application, the magistrate of McIntosh County issued a search warrant for defendant's vehicle. The trooper obtained the warrant approximately twenty minutes after he and defendant arrived at the sheriff's office.[2]

13. A search of the automobile revealed approximately $189,000 [3] in cash. Riner reporte[d] this finding to Agent James A. Evans of the Georgia Bureau of Investigation.

14. When Agent Evans arrived at approximately 10:30 a.m., he conducted a full search of the automobile, seized the car and immediately notified defendant that he

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[2] The trooper stopped defendant at approximately 8:24 a.m. The trooper and defendant remained on the side of the highway for about fifteen minutes, then took about fifteen minutes to drive roughly ten and one-half miles to the sheriff's office. Thus, they arrived at the sheriff's office at about 8:55 a.m. The search warrant application states that it was signed by the trooper at 10:07 a.m. and issued by the magistrate at 10:15 a.m.; however, the Court finds that these times were recorded incorrectly and the actual times were 9:07 a.m. and 9:15 a.m., respectively. The Court makes this finding based on the following: The trooper applied for the warrant shortly after arriving at the sheriff's office. The magistrate arrived at the sheriff's office about five minutes after trooper and defendant. As soon as the trooper received the warrant, he made a quick search of the vehicle and then immediately phoned Agent Evans of the Georgia Bureau of Investigation. Agent Evans testified that he received the trooper's call at his home on St. Simons Island, Georgia, at about 9:45 a.m. Agent Evans arrived at the sheriff's office in McIntosh County at approximately 10:30 a.m.

[3] The final count revealed $186,626.

was under arrest for a violation of the Travel Act.

15. At approximately 1:15 p.m., Taxacher signed a waiver certificate showing that he had been given his *Miranda* rights and voluntarily agreed to make a statement. At this time, Agent Evans interrogated defendant.

16. During the course of the interview, defendant made certain incriminating statements.

CONCLUSIONS OF LAW

I. Motion to Suppress Evidence

(A) Initial Stop

The Court finds that Trooper Riner acted within his authority in stopping defendant for speeding and in taking defendant to the sheriff's office to allow defendant to post a cash bond and to allow the trooper to investigate the status of defendant's vehicle registration. The Court further finds that, when the trooper learned that defendant's driver's license was under suspension, he was authorized to prevent defendant from driving on Georgia highways.

The Georgia Code provides that a state trooper may bring a person who has violated the traffic laws of Georgia to the traffic violations bureau and allow the offender to post a cash bond for his appearance. O.C.G.A. § 40-13-57. The Code also provides that a trooper may not release anyone arrested for "any motor vehicle registration violation." O.C.G.A. § 40-13-53(b)(2). Additionally, the Georgia Code provides that the Department of Motor Vehicles is authorized to suspend or revoke the operating privileges of any nonresident upon receiving notice that the person is driving with a

suspended license. O.C.G.A. § 40-5-20(a) (requiring a valid driver's license in order to drive a motor vehicle on Georgia highways); O.C.G.A. § 40-5-52 (authorizing suspension of operating privileges of a nonresident upon notice of a conviction in other state of an offense that would be grounds for revocation or suspension of license in Georgia).

Although the trooper had the authority to conduct a limited search of the passenger compartment of defendant's vehicle incident to defendant's lawful custodial arrest, the Court finds that any evidence in the trunk was outside the permitted scope of such a search and would not have been "inevitable discovered." *Nix v. Williams*, 467 U.S. 431, 81 L.Ed.2d 377 (1984); *Belton v. New York*, 453 U.S. 454, 69 L.Ed.2d 768 (1981).

(B) Detention

As discussed more thoroughly below, the Court concludes that, at the time of the stop and detention, the trooper did not have sufficient probable cause to search or detain the vehicle under the vehicle exception to the warrant requirement. The Supreme Court stated in *Carroll v. United States*, 267 U.S. 132, 154-56, 69 L.Ed. 543, 552 (1924), that when "there is known to a competent official authorized to search probable cause to believe that [a vehicle is] carrying contraband or illegal merchandise" the officer may stop the vehicle and search it without a warrant. Alternatively, the officer may detain the vehicle and obtain a warrant if he prefers. "Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S. 42, 51, 26 L.Ed.2d 419, 428 (1970).

In the absence of probable cause, the Court finds that the trooper should have completed the

necessary procedures at the sheriff's office regarding defendant's traffic violations; ascertained that defendant's motor vehicle registration was valid; then given defendant an opportunity to post a cash bond for his appearance and leave the sheriff's office by whatever means he was able, short of operating a motor vehicle himself. Once the traffic violations were processed, the registration cleared and a cash bond posted, defendant would have had the right to retrieve his belongings from the vehicle, call a taxicab and continue his journey; or he could have arranged for someone with a valid driver's license to drive him and his belongings in the rental vehicle on to his destination. This finding negates the admissibility of any evidence on the basis of the doctrine of inevitable discovery. *Nix v. Williams*, *supra*.

(C) Warrant/Probable Cause

The Court concludes that a search warrant for the vehicle was obtained while defendant was being validly detained for the time period necessary to process his traffic violations. However, the Court finds that the magistrate who issued the warrant did not have a "substantial basis for . . . conclud[ing] that probable cause existed." Thus, the Court concludes that the warrant was not valid. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548 (1983) (citation omitted).

Probable cause defies easy definition. The Supreme Court, in *Brinegar v. United States*, 338 U.S. 160, 175, 93 L.Ed. 1879, 1891 (1949), stated that probable cause exists where the facts and circumstances known to an officer are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed" (*citing Carroll*, 267 U.S. at 162, 69 L.Ed. at 555). More recently, the Supreme Court

in *Gates*, 462 U.S. at 241, 76 L.Ed.2d at 550, stated that "probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act'" (*quoting Brinegar v. United States*, 338 U.S. at 175, 93 L.Ed. at 1879). Probable cause is to be assessed by a "totality of the circumstances" analysis. *Gates*, 462 U.S. at 231, 76 L.Ed.2d at 544.

The magistrate based her finding of probable cause on the following information: (1) defendant appeared overly nervous; (2) the rental agreement indicated that the car was past due; (3) defendant gave inconsistent stories about his travel plans; and (4) defendant initially consented to a search of the vehicle, then withdrew consent when the officer asked to look into a specific satchel.

Nervousness and inconsistent or illogical responses are not sufficient to establish probable cause. As the Eleventh Circuit stated in *United States v. Brown*, 731 F.2d 1491, 1494 (1984), "general nervousness is slender evidence of specific lies, especially because being stopped and questioned by police officers could be alarming even to the innocent . . . . " Moreover, as discussed by the Seventh Circuit in *Moya v. United States*, 761 F.2d 322, 325-26 (7th Cir. 1985):

> There are several innocent explanations for a lack of forthrightness with law enforcement officers. A person could simply be mistaken or have forgotten; this explanation appears particularly plausible if one considers the stress that someone might reasonably feel when subjected to police questioning. Alternatively, a person could be attempting to conceal information that is

> personal or embarrassing but not criminal, or supplying answers that she or he believes will expedite the questioning process [fn. omitted]. We conclude that Moya's seeming dishonesty with the officer was insufficient to establish probable cause. *See also Place*, 103 S.Ct. at 2640, 2644 (no probable cause found although the defendant falsely reported to law enforcement officers that his luggage had already been searched by other officers).

Neither does the expiration date on the rental agreement constitute probable cause to believe that defendant's vehicle contained contraband. Defendant explained that his rental contract had been extended, and he produced a receipt for a cash deposit on the car to substantiate his story. The status of the vehicle could have been verified by a check with the Motor Vehicle Bureau of the rental agency.

Finally, defendant's invocation of his Fourth Amendment right does not provide probable cause to search.

(D) *Leon* Exception

Although the Court finds that the search of defendant's vehicle was conducted pursuant to an invalid warrant, the Court concludes that the facts of this case fall squarely within the exception to the exclusionary rule established by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984).

In *Leon*, the Court concluded that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in

those unusual cases in which exclusion would further the purpose of the exclusionary rule." *Leon*, 468 U.S. at 918, 82 L.Ed.2d at 695. "The Court has stressed that the 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'" *Illinois v. Krull*, 480 U.S. ___, 94 L.Ed.2d 364, 373 (1987) (*quoting United States v. Calandra*, 414 U.S. 338, 347, 38 L.Ed.2d 561 (1974)). "[The exclusionary rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919, 82 L.Ed.2d at 696. Thus, "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," the exclusionary rule will not be applied. *Leon*, 468 U.S. at 920, 82 L.Ed.2d at 697. The Court's "good-faith inquiry is confined to the objectively ascertainable question whether a *reasonably well-trained officer* would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23, 83 L.Ed.2d at 698 n.23 (emphasis added). A conclusion of probable cause may appear technically unreasonable to a legally trained individual exercising hindsight; yet, the same conclusion will appear quite reasonable -- in fact inescapable -- to a "well-trained officer" confronted with the "totality of the circumstances" in an actual encounter.

In this case, the trooper testified that, based on his experience, he believed that defendant's statements and behavior indicated that defendant was involved in illegal activity. Although the trooper thought that he had probable cause to conduct a "*Carroll*" search of the vehicle at the scene of the highway stop, he decided not to search the car without a warrant. The trooper took defendant to the sheriff's office in order to process the speeding citation

and to verify defendant's driver's license and vehicle registration. The trooper radioed ahead to the sheriff's office and asked them to notify the magistrate to meet him at the office in order to expedite his search warrant application. The trooper filled out a warrant application shortly after he arrived at the sheriff's office. Because it was the first time the trooper had ever completed a warrant application, he called the local district attorney to be sure that he did it properly. The trooper did not conduct a search of the vehicle until the magistrate had considered the application and issued the warrant.

While the Court finds that the facts recited in the trooper's affidavit fail to meet the legal standard of probable cause, the Court is unable to find that the warrant was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Leon*, 468 U.S. at 923, 82 L.Ed.2d at 699 (*quoting Brown v. Illinois*, 422 U.S. [5]90, 610-11, 45 L.Ed.2d 416)). Nor was the trooper "dishonest" or "reckless" in preparing his affidavit. *Leon*, 468 U.S. at 926, 82 L.Ed.2d at 601. The trooper's actions demonstrate that he made every effort to carry out his duties properly and expeditiously within the confines of the law.

II. Motion to Suppress Statements

The Court concludes that defendant made statements knowingly and voluntarily after he received *Miranda* warnings and signed a *Miranda* waiver certificate. The court finds that defendant's knowing and voluntary waiver is sufficient to purge any possible taint that may have arisen from his detention. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 (1963).

In accordance with all of the foregoing, the Court finds as a matter of fact and concludes as a matter of law

that the defendant's motions to suppress evidence seized and statements made should be, and hereby are, DENIED.

SO ORDERED, this 25th day of January, 1988.

/s/ Anthony A. Alaimo
CHIEF JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA